

BEFORE THE FOREST PRACTICES APPEALS BOARD  
STATE OF WASHINGTON

FRIENDS OF SUMAS MOUNTAIN, INC. )

Appellants, )

v. )

STATE OF WASHINGTON DEPARTMENT  
OF NATURAL RESOURCES; TAT (U.S.A.) )  
CORPORATION; and TRILLIUM )  
CORPORATION )

Respondents )

FPAB No. 92-13

ORDER ON APPELLANTS  
MOTION FOR EMERGENCY  
SUSPENSION OF  
DEPARTMENT APPROVAL

THIS MATTER having come before William A. Harrison,  
Administrative Appeals Judge, on appellants' motion for an  
emergency order suspending the Department of Natural Resources  
approval of the forest practices application FPA 1914650.

Appellants' motion is supported by a memorandum of law and  
affidavits of Don J. Easterbrook, Ph.D, R. Scott Babcock, Ph.D,  
Jean Westgate, Ken Ryan, and Jane Lowe-Webster.

Based on a review of appellants motion and specific facts  
shown by the supporting affidavits, it clearly appears that  
immediate and irreparable injury, loss, or damage will result  
to appellants before respondents' can be heard in opposition.

It is hereby ORDERED that:

The approval by the Department of Natural Resources of the

ORDER - 1

1 forest practices application FPA #1914650 filed by TAT (USA)  
2 Corp., and Trillium Corporation, is hereby SUSPENDED, and all  
3 Forest Practice activity at this site must cease pending a  
4 *upon affidavits, at 9:30 AM, June 15, 1992, at this office in Lacey*  
5 decision from a hearing with all interested parties on whether  
6 a temporary suspension of Department approval should be granted  
7 pending the final determination of this appeal.

8 DATED this 5<sup>th</sup> day of June, 1992 at Lacey Washington.

9 *William A. Harrison*  
10 William A. Harrison  
11 Administrative Appeals Judge

12 Presented by:

13 BRICKLIN & GENDLER

14 By: *David S. Mann*  
15 David S. Mann, No. 21068  
16 Attorneys for Appellants

17 frsunas\order

28 ORDER - 2

1                   **BEFORE THE FOREST PRACTICES APPEALS BOARD**  
2                   **STATE OF WASHINGTON**

3       **FRIENDS OF SUMAS MOUNTAIN,**                   )

4                   **Appellants,**                   )

5                   **and**                   )

6                   )

7       **WHATCOM COUNTY,**                   )

8                   **Appellant-Intervenor,**                   )

9                   **and**                   )

10                   )

11       **NOOKSACK TRIBE,**                   )

12                   **Appellant-Intervenor,**                   )

13                   **v.**                   )

14       **STATE OF WASHINGTON, DEPARTMENT**                   )  
15       **OF NATURAL RESOURCES; TAT (U.S.A.)**                   )  
16       **CORPORATION; TRILLIUM**                   )  
17       **CORPORATION; DEPARTMENT OF**                   )  
18       **ECOLOGY and FOREST PRACTICES**                   )  
19       **BOARD,**                   )

20                   **Respondents.**                   )

21       \_\_\_\_\_)

22                   Forest Practices Application FP 1914650 is hereby suspended and stayed south of Falls  
23                   Creek pending the final decision in this appeal.

24                   **SO ORDERED.**

25

26

27       **TEMPORARY SUSPENSION**  
      **FPAB NO. 92-13**

DATED this 9<sup>th</sup> day of July, 1992.

William A. Harrison  
Honorable William A. Harrison  
Administrative Appeals Judge

CONCUR:  
STATE OF WASHINGTON  
FOREST PRACTICES APPEALS BOARD

CLAUDIA K. CRAIG, Chair

Norman L. Winn  
NORMAN L. WINN, Member

Signed in respect of  
Thurston County Superior Court  
Cause No. 92-2-01467-7  
and without the waiver of any right.

F91-13S

TEMPORARY SUSPENSION  
FPAB NO. 92-13

1  
2 DATED this 9<sup>th</sup> day of July, 1992

3  
4 William A. Harrison  
5 Honorable William A. Harrison  
6 Administrative Appeals Judge

7 CONCUR  
8 STATE OF WASHINGTON  
9 FOREST PRACTICES APPEALS BOARD

10 Claudia K. Craig  
11 CLAUDIA K. CRAIG, Chair

12  
13 Norman L. Winn  
14 NORMAN L. WINN, Member

15 Signed in respect of  
16 Thurston County Superior Court  
17 Cause No 92-2-01467-7  
18 and without the waiver of any right

19  
20 JF91-13S

21  
22  
23  
24  
25  
26  
27 TEMPORARY SUSPENSION  
FPAB NO. 92-13

(2)

RECEIVED

JUN 25 1992

ENVIRONMENTAL  
HEARINGS OFFICE

BEFORE THE FOREST PRACTICES APPEALS BOARD  
STATE OF WASHINGTON

FRIENDS OF SUMAS MOUNTAIN, INC. )

Appellants, )

and )

NOOKSACK TRIBE, )

Intervenors, )

v. )

STATE OF WASHINGTON DEPARTMENT  
OF NATURAL RESOURCES; TAT (U.S.A.) )  
CORPORATION, TRILLIUM CORPORATION; )  
DEPARTMENT OF ECOLOGY AND FOREST )  
PRACTICES BOARD )

Respondents )

FPAB No. 92-13

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER TEMPORARILY  
SUSPENDING DNR PERMIT  
APPROVAL, IN PART, AND  
GRANTING INTERVENTION

Upon consideration of the material set forth in the appendix hereof, and being fully advised, the following is entered:

THIS MATTER came on for hearing upon the Motion of the Friends of Sumas Mountain for an order suspending DNR approval of Forest Practices Application No. 1914650 pending a final determination of this matter by the Forest Practices Appeals Board. The Board, acting through Administrative Appeals Judge William A. Harrison, received the instant motion, scheduled a hearing, and served notice of such hearing upon the parties. Applicant/Respondent TAT (U.S.A.) requested and received a continuance of one week to respond to the motion.

The Nooksack Tribe moved to intervene.

Friends of Sumas Mountain's motion for a temporary

ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -1

ORIGINAL

BRICKLIN & GENDLER  
ATTORNEYS-AT-LAW  
SUITE 1015 FOURTH AND PKE BUILDING  
SEATTLE WA 98101  
(206) 821 8868

1 suspension and Nooksack Tribe's motion to intervene were heard  
2 on June 22, 1992, at 9:30 a.m. The motions were heard on  
3 affidavits and oral argument. On the morning of the hearing,  
4 TAT (U.S.A.) presented a letter from W.D. Purnell, who was  
5 present at the hearing and attested to the letter.  
6

7 Oral argument was presented by David S. Mann for Friends  
8 of Sumas Mountain, William F. Lenihan for the applicant TAT  
9 (U.S.A.) Corp., Jeffrey Jon Bode for intervenor Nooksack Tribe  
10 and Jonathon Gurish, Assistant Attorney General for the State  
11 Department of Natural Resources on June 22, 1992.

12 I. INTERVENTION OF THE NOOKSACK TRIBE

13 Based upon the record and the hearing arguments, the Board  
14 finds:

15 1. The Nooksack Tribe is a federally recognized  
16 Indian Tribe organized pursuant to section 16 of the Indian  
17 Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §  
18 476, and currently operating under a Constitution and By-laws  
19 approved by the U.S. Department of the Interior on September  
20 24, 1973.

21 2. The Nooksack Tribe is one of the holders of the  
22 federally protected right of taking fish secured by Indians by  
23 the Treaty of Point Elliot, January 22, 1855, 12 Stat. 927.  
24 Among the places at which Petitioner's members have exercised  
25 this treaty right to take fish is the portion of the Sumas  
26 River downstream from the site at which the instant FPA would  
27 allow timber clearcutting and other forest practices.

28 ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -2

1  
2 3. That, pursuant to CR 24, the Nooksack Tribe  
3 timely moved to intervene in this action and has made the  
4 necessary showing that it has interests at stake that may not  
5 be adequately represented by the parties currently involved.  
6 Intervention will not unduly delay or prejudice the  
7 adjudication of the rights of the original parties. Therefore

8 IT IS ORDERED, that the Motion of the Nooksack Tribe to  
9 intervene in this proceeding is granted.

10 II. TEMPORARY SUSPENSION OF DEPARTMENT APPROVAL

11 A. Findings of Fact

12 1. Among the corporate interests of the Friends of  
13 Sumas Mountain (Friends) is protection of the Whatcom County  
14 environment used and enjoyed by its members.

15 Members of Friends of Sumas Mountain use and enjoy  
16 the environment that is directly affected by this forest  
17 practices permit. Members of Friends of Sumas Mountain also  
18 own property that is directly affected by this forest practices  
19 permit. Friends and its members will suffer injury in fact if  
20 the forest practices as approved are conducted.

21 2. Dr. Don J. Easterbrook graduated from the  
22 University of Washington in 1962 with a Ph.D in geology and is  
23 currently a Professor of Geology at Western Washington  
24 University in Bellingham, Washington. Dr. Easterbrook's  
25 special field of expertise is in geology, including slope  
26 stability, landslides, and environmental geology. Dr.  
27 Easterbrook's findings are based, in part, on two visits he

28 ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -3



1 made to the site of the proposed FPA in April, 1992.

2  
3 3. As set forth in his affidavit, Dr. Easterbrook  
4 finds that the proposed site is underlain by serpentinite  
5 bedrock. In this respect, the site is similar to the Swift  
6 Creek drainage to the north of the site and the Dale Creek  
7 drainage to the south of the site, both of which latter two  
8 drainages have experienced landslides of the type that is of  
9 concern in this litigation. Dr. Easterbrook also observed  
10 substantial landslides on the recently logged property adjacent  
11 to the site to the north, and creek damage resulting therefrom.

12 4. Based on his investigations, experience, and  
13 expertise, Dr. Easterbrook concludes that the potential at this  
14 site for slope failure similar to those cited above is  
15 extremely high. The Board adopts this testimony and finding.

16 5. Dr. R. Scott Babcock graduated from the  
17 University of Washington in 1970 with a Ph.D in geology. Dr.  
18 Babcock is an Associate Professor of Geology at Western  
19 Washington University in Bellingham. Dr. Babcock's findings,  
20 as set forth in his declaration, confirm Dr. Easterbrook's  
21 essential findings that the entire area between Power Creek and  
22 Falls Creek is underlain by serpentinite just beneath the  
23 mantle of glacial till that covers the slope. Dr. Babcock also  
24 concludes that slope failure has possibly already occurred on  
25 the site which would be logged pursuant to the forest practice  
26 approval at issue here. The Board adopts this testimony nad  
27 finding.

28 ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -4

1  
2 6. The potential for a landslide on this site  
3 exceeds the area of the stream channels themselves in Power  
4 Creek or Falls Creek, and extends across the site between the  
5 two creeks. This is the area south of Falls Creek.

6 7. If harvesting were to proceed, it would present  
7 an imminent potential for substantial debris flows or mass  
8 failure on uninterrupted steep slopes above streams, thereby  
9 causing material damage public resources.

10 8. The danger of a landslide north of Falls Creek is  
11 surficial.

12 9. Willard D. Purnell is a professional engineer in  
13 the State of Washington and a geologist. Mr. Purnell  
14 acknowledges the general similarities in stratigraphy between  
15 the Swift Creek slide area and both Power Creek and Falls Creek  
16 in the subject site. Mr. Purnell points out that despite the  
17 similarities in stratigraphy, there are differences in the  
18 elevation of the site in comparison to the Swift Creek and Dale  
19 Creek slides and in the geomorphology.

20 10. The differences in the elevation between the  
21 Swift Creek and Dale Creek slides and the present site is not  
22 great. The difference in the geomorphology, which is largely  
23 one of steam channel slopes, is overcome by Dr. Easterbrook and  
24 Dr. Babcock's findings that the potential for landslide at this  
25 site is not limited to the stream channels but extends to the  
26 entire area between these two streams, essentially in all areas  
27 south of Falls Creek on the site.

28 ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -5

1  
2 11. Mr. Robert Sanders, resource manager for the  
3 Applicant, TAT (U.S.A.) Corp., stated by affidavit that the  
4 loss in the quality and quantity of timber owing to the effect  
5 of insect infestation on the downed timber will be \$30,500 and  
6 that there will be an increased cost in roadbuilding in 1993  
7 over 1992 of \$41,500.

8 12. Mr. David McGee, the secretary-treasurer and  
9 chief financial officer of TAT, stated by affidavit that the  
10 cost of replacement of the timber on Sumas Mountain to meet its  
11 contractual liability to its export buyer will be \$530,000.  
12 This claimed loss is speculative. No contracts were submitted  
13 by TAT to verify this claimed liability.

14 B. Conclusions of Law

15 1. Appellants properly lodged this appeal pursuant  
16 to the authority of RCW 76.09.220(8), which allows for the  
17 filing of an appeal by a person aggrieved by the granting of a  
18 forest practices permit.

19 2. The rule of the Forest Practices Appeals Board,  
20 WAC 223-08-087, provides for preliminary proceedings that stay  
21 the effectiveness of a permit pending a hearing on the merits.

22 3. Under WAC 223-08-087, the Administrative Appeals  
23 Judge for the Forest Practices Appeals Board has the authority  
24 to stay a forest practices permit pending a decision on the  
25 merits before the entire Appeals Board.

26 4. The Forest Practices Appeals Board has the  
27 authority to review forest practices permits granted by the

28 ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -6

1 Department of Natural Resources.

2  
3 5. The standards set forth in Tyler Pipe  
4 Industries, Inc. v. The Department of Revenue, 96 Wn.2d 785,  
5 638 P.2d 1213 (1982) are applicable to determine whether a  
6 temporary suspension of the Department's approval should issue.

7 6. Appellant Friends of Sumas Mountain has shown a  
8 legal right to protection of its interest and right to a  
9 healthful environment on its own behalf, and to its members'  
10 property, lives, and environmental rights. Intervenor Nooksack  
11 Tribe has shown a legal right to the protection of the fishing  
12 interests of the Tribe and its members.

13 7. Both Friends of Sumas Mountain and Nooksack  
14 Tribe ("appellants") have shown a well-grounded fear of  
15 immediate invasion of their rights.

16 8. Temporary rule WAC 222-16-050(1)(e) deems a  
17 timber harvest to be within the category of Class IV where  
18 special soils, geologic structure, and local hydrology combine  
19 to create a potential for increasing slope instability where  
20 such timber harvest will occur on a slope above any water type,  
21 where there is also a potential for a substantial debris flow  
22 or mass failure, harming public resources.

23 9. Appellants have made a sufficient showing to  
24 conclude that there is a high probability of success on the  
25 merits of their challenge under the Forest Practices Act and  
26 WAC 222-16-050(1)(e).

27 10. The Forest Practices Act requires consideration  
28 ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -7

1 of proposals under the State Environmental Policy Act that have  
2 the potential for substantial impacts to the environment. If  
3 the Forest Practices Act and WAC 222-16-050(1)(e) does not  
4 alone justify the stay, appellants have likewise shown that  
5 there is a probability of success on the merits of their  
6 challenge under the Forest Practices Act and the State  
7 Environmental Policy Act, likewise requiring a stay.

8 11. The appellants have shown the manifest  
9 likelihood of an actual and substantial injury.

10 12. In balancing the interests of the parties,  
11 where, as here, harvest has begun and five acres can be cut in  
12 the space of one to two days, there exists a possibility that  
13 the timber will be completely removed, and the case made moot,  
14 and the jurisdiction of the Appeals Board frustrated and  
15 terminated if there is not an immediate suspension of practices  
16 until a hearing can be convened. This is balanced against the  
17 potential economic loss to the permittee. Due to the length of  
18 time estimated by the applicant for a full hearing, and the  
19 dates available for this hearing, imposition of this stay will  
20 substantially prohibit operations during the summer season.

21 13. Based on the evidence presented by TAT (U.S.A.),  
22 failure to remove the already downed timber and build the roads  
23 in 1992 as opposed to 1993 might result in damages of \$72,000.  
24 Any amount that might be lost by non-performance of a contract  
25 due to the lawful process of litigation is speculative. TAT  
26 has made no showing that it is liable by contract or otherwise

27 ORDER SUSPENDING FOREST  
28 PRACTICES APPROVAL, IN PART -8

1 to replace the timber it proposes to harvest here.

2  
3 14. In the matter of the Swinomish Tribe v. DNR and  
4 Chamberlain Farms, FPAB No. 87-6 (2/19/88)(Order Suspending  
5 Forest Practices Approval, In Part), a conclusion was entered  
6 where an appealing party was an Indian tribe. That case,  
7 involving the Swinomish Tribal Community, cited Anderson v.  
8 O'Brian, 84 Wn.2d 64, 524 P.2d 390 (1974) (finding that the  
9 Kalispell Indian Community was "an entity with wholly public  
10 functions" and was "chartered as a body politic incorporated  
11 under the Indian Reorganization Act of 1934"). The Board there  
12 concluded that a public corporation created by government for  
13 political purposes and having subordinate and local powers of  
14 government fit within the definition of municipality, and  
15 further cited the Federal Clean Water Act, 33 U.S.C. § 1362,  
16 and the Resource Conservation Recovery Act, 42 U.S.C. § 6903,  
17 where tribes have been treated as states in federal statutes.  
18 An Indian tribe qualifies under Civil Rule 65 as a municipality  
19 within the meaning of the term as it appears here, and as  
20 adopted by the rules of this Board, and is therefore exempt  
21 from bonding requirements for a temporary injunction.

22 15. Any conclusion which ought to be a finding is hereby  
23 stated as such; and finding which ought to be a conclusion is  
24 hereby stated as such.

25 Based upon these findings of fact and conclusions of law,

26 IT IS ORDERED that the motions of the Friends of  
27 Sumas Mountain and the Nooksack Tribe to temporarily suspend

28 ORDER SUSPENDING FOREST  
PRACTICES APPROVAL, IN PART -9

1 DNR approval of FPA No. 1914650 until a hearing on the merits  
2 is granted in part and denied in part, as follows:  
3

4 1. TAT may operate under its permit to construct roads  
5 and landings and log timber as authorized in Permit No. 1914650  
6 within the area north of Falls Creek only.

7 2. TAT may not operate under Permit No. 1914650 within  
8 the area south of Falls Creek during the pendency of this  
9 action or until further order of the Board.

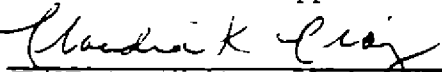
10 3. The Nooksack Tribe shall not be required to furnish  
11 a bond or other security for this suspension.

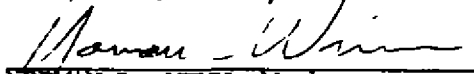
12 4. The Friends of Sumas Mountain shall provide a bond  
13 for \$72,000 as security pursuant to WAC 223-08-087(6).  
14 Evidence of the bond shall be filed at the Environmental  
15 Hearings Office by 12:00 p.m. on June 26, 1992 and a copy  
16 served upon TAT's attorney by that time or the Suspension Order  
17 on behalf of the Friends of Sumas Mountain only will be of no  
18 further force and effect.

19 DATED this 31<sup>st</sup> day of ~~June~~ <sup>July</sup>, 1992.

20   
21 Honorable William A. Harrison  
22 Administrative Appeals Judge

23 CONCUR  
24 State of Washington  
25 Forest Practices Appeals Board

26   
27 CLAUDIA K. CRAIG, Chair

28   
NORMAN L. WINN, Member

29 ORDER SUSPENDING FOREST  
30 PRACTICES APPROVAL, IN PART -10

## APPENDIX

The following were considered:

1. Motion for Temporary Suspension of Department Approval filed on June 4, 1992.  
  
Together with: Affidavit of Don J. Easterbrook and attachments thereto  
Affidavit of Jean Westgate  
Affidavit of R. Scott Babcock and attachments thereto  
Affidavit of Ken Ryan  
Affidavit of Jane Lowe-Webster  
Declaration of Jean Westgate filed by appellants
2. Supplemental Affidavit of R. Scott Babcock, with attachments, filed by appellants, on June 12, 1992.
3. Petition to Intervene of Nooksack Indian Tribe and Petitioner's Joinder in Appellant's Request for Preliminary Relief, filed on June 18, 1992.
4. Declarations of Robert Sanders and David McGee, filed by TAT (USA) Corporation, on June 19, 1992.
5. Report of W. D. Purnell & Associates, Inc., filed by TAT (USA) Corporation, on June 22, 1992.
6. Articles of Incorporation of Friends of Sumas Mountain, filed by TAT (USA) Corporation, on June 22, 1992.
7. State DNR Notes on Informal Conference filed by Department of Natural Resources, on June 22, 1992.
8. Declaration of Dale Griggs filed by Nooksack Indian Tribe, on June 22, 1992.
9. Declaration of David S. Mann with attachments, filed by appellants on June 22, 1992.
10. WSR 92-12-038 Emergency Rules of the Forest Practices Board, filed by Department of Natural Resources on June 22, 1992.
11. The oral argument of counsel heard June 22, 1992, or the record thereof.

The records and files herein.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

RECEIVED  
JUL 10 1992

ENVIRONMENTAL  
HEARINGS OFFICE

BEFORE THE FOREST PRACTICES APPEALS BOARD  
STATE OF WASHINGTON

FRIENDS OF SUMAS MOUNTAIN, INC. )

Appellants, )

and )

NOOKSACK TRIBE, )

Intervenors, )

v. )

STATE OF WASHINGTON DEPARTMENT  
OF NATURAL RESOURCES; TAT (U.S.A.) )  
CORPORATION; TRILLIUM CORPORATION; )  
DEPARTMENT OF ECOLOGY AND FOREST )  
PRACTICES BOARD, )

Respondents. )

FPAB No. 92-13

FINDINGS, CONCLUSIONS,  
AND ORDERS ON WHATCOM  
COUNTY'S MOTIONS TO  
INTERVENE AND FOR  
TEMPORARY SUSPENSION,  
AND TAT'S MOTIONS  
TO SHORTEN TIME AND  
TO DISSOLVE SUSPENSION

Upon consideration of the material set forth in the appendix hereof, and  
being fully advised, the following is entered:

This matter came on for hearing by telephone before Adminis-  
trative Appeals Judge William A. Harrison on July 1, 1992.  
Bricklin & Gendler and Michael W. Gendler represented appellant  
Friends of Sumas Mountain and applicant for intervention and for  
temporary suspension Whatcom County. Jeffrey Jon Bode represent-  
ed intervenor Nooksack Tribe. Schwabe Williamson & Wyatt and  
William F. Lenihan represented respondent TAT. Assistant  
Attorney General Jonathon Gurish represented respondent DNR.  
Patricia H. O'Brien represented the Forest Practices Board.

ORIGINAL

BRICKLIN & GENDLER  
ATTORNEYS AT LAW  
SUITE 1015 FOURTH AND PIKE BUILDING  
SEATTLE WA 98101  
(206) 621 8888

1 Kathryn L. Gerla represented the Department of Ecology. Daniel  
2 Zender represented respondent Trillium Corporation.

3  
4 At the outset of the hearing, Judge Harrison granted TAT's  
5 motion to shorten time. Judge Harrison thereafter heard the  
6 argument of counsel and recessed to review the record and take  
7 the matter under advisement. Having reviewed the files and  
8 records in this matter and having fully considered the arguments  
9 and memoranda of the parties, and the Board having stated its  
10 decisions through Judge Harrison on the afternoon of July 1,  
11 1992, the Board now makes the following findings, conclusions,  
12 and orders:

13 I. WHATCOM COUNTY INTERVENTION

14 With respect to Whatcom County's motion to intervene, the  
15 Board finds and concludes as follows:

16 1. Whatcom County has a statutory interest pursuant to RCW  
17 76.09.050(8) and (9) sufficient to sustain intervention pursuant  
18 to CR 24(a)(1). This statutory interest is not limited to lands  
19 to be converted to another use.

20 2. Disposition of this action without Whatcom County as a  
21 party would impair as a practical matter the County's ability to  
22 protect its interests. The interests of appellant Friends of  
23 Sumas Mountain and intervenor Nooksack Tribe differ from Whatcom  
24 County's public interests, all of which are affected by the slide  
25 potential of the proposed harvest. Absent intervention, Whatcom  
26 County has no assurance that the relief it requests through  
27 intervention will be achieved.

28 ORDERS ON WHATCOM COUNTY'S MOTIONS  
TO INTERVENE AND FOR TEMPORARY SUSPENSION,  
AND TAT'S MOTIONS TO SHORTEN TIME - 2

1  
2 3. The deadline for filing an appeal does not bar interven-  
3 tion thereafter. This Board previously has so decided, in  
4 Whatcom County Water District No. 10 v. DNR. WAC 223-08-097  
5 allows intervention "at any time."

6 4. There is no presumption of correctness of the DNR  
7 approval. RCW 76.09.050(9). Review is de novo. WAC 223-08-177.  
8 See also San Juan County v. DNR, 28 Wn. App. 796 (1981).

9 5. It would not be appropriate to condition Whatcom  
10 County's intervention upon a presumption of correctness of the  
11 DNR approval, when such presumption is not provided for by the  
12 governing statutes.

13 Based on the foregoing findings and conclusions, it is  
14 hereby ordered:

15 1. The motion of Whatcom County to intervene is granted.

16 II. WHATCOM COUNTY MOTION FOR TEMPORARY SUSPENSION

17 With respect to Whatcom County's motion for a temporary  
18 suspension, the Board finds and concludes as follows:

19 1. Whatcom County has adopted the affidavits previously  
20 filed by existing parties. This is a permissible basis for  
21 Whatcom County's motion. Whatcom County is not required to  
22 submit separate affidavits or resubmit the ones already filed.

23 2. The evidence already before the Board has demonstrated  
24 the potential for immediate and material damage to public  
25 resources, within the meaning of RCW 76.09.050(8).

26 3. The Board hereby incorporates by this reference and  
27 adopts as if fully set forth herein the findings of fact and

28 ORDERS ON WHATCOM COUNTY'S MOTIONS  
TO INTERVENE AND FOR TEMPORARY SUSPENSION,  
AND TAT'S MOTIONS TO SHORTEN TIME - 3

1 conclusions of law set forth in its order entered on this date  
2 temporarily suspending DNR approval, in part, and granting  
3 intervention to the Nooksack Tribe.

4 4. No bond is required of Whatcom County. WAC 223-08-  
5 087(6); RCW 4.92.080; CR 65(c).

6 5. The motives of Whatcom County which are attributed to  
7 the County by TAT for moving to intervene and moving for a  
8 suspension are irrelevant and beyond the purview of this Board.

9 Based on the foregoing findings and conclusions, it is  
10 hereby ordered:

11 1. Whatcom County's motion for temporary suspension of DNR  
12 approval of FPA No. 1914650 until a hearing on the merits is  
13 granted in part and denied in part, as follows:

14 A. TAT may operate under its permit to construct roads  
15 and landings and log timber as authorized in permit no. 1914650  
16 within the area north of Falls Creek only.

17 B. TAT may not operate under permit no. 1914650 within  
18 the area south of Falls Creek during the pendency of this action  
19 or until further order of the Board.

20 C. Whatcom County is not required to furnish a bond or  
21 other security for this suspension.

### 22 III. TAT MOTIONS TO DISSOLVE

23 Upon TAT's motions to dissolve the temporary suspension  
24 previously granted on motion of Friends of Sumas Mountain in  
25 which the Nooksack Tribe joined, the Board finds and concludes as  
26 follows:

27  
28 ORDERS ON WHATCOM COUNTY'S MOTIONS  
TO INTERVENE AND FOR TEMPORARY SUSPENSION,  
AND TAT'S MOTIONS TO SHORTEN TIME - 4

1  
2 1. The temporary suspension in favor of Friends of Sumas  
3 Mountain was conditioned upon the posting of a bond by noon on  
4 June 26, 1992.

5 2. The bond was not posted.

6 3. The temporary suspension cannot stand upon the motion of  
7 Friends of Sumas Mountain.

8 4. The temporary suspension can stand upon the motion of  
9 the Nooksack Tribe for the reasons previously stated by the Board  
10 through Judge Harrison on June 22, 1992.

11 5. Upon full consideration and reconsideration of the  
12 arguments previously presented, the Board finds no reason to  
13 change the ruling made by Judge Harrison on June 22, 1992.

14 In accordance with the foregoing findings and conclusions,  
15 it is hereby ordered:

16 1. TAT's motion to dissolve the temporary suspension is  
17 denied. The temporary suspension remains in effect to the full  
18 extent of this Board's authority.

19 Dated this 31<sup>st</sup> day of July, 1992.

20 William A. Harrison

21 HONORABLE WILLIAM A. HARRISON  
22 Administrative Appeals Judge

23 Claudia K. Craig

24 CLAUDIA K. CRAIG, Chair

25 Norman L. Winn

26 NORMAN L. WINN, Member

27  
28 ORDERS ON WHATCOM COUNTY'S MOTIONS  
TO INTERVENE AND FOR TEMPORARY SUSPENSION,  
AND TAT'S MOTIONS TO SHORTEN TIME - 5

1 Presented by:

2 BRICKLIN & GENDLER

3 By: 

4 Michael W. Gendler, WSBA No. 8429  
5 Attorney for Friends of Sumas  
6 Mountain and Whatcom County

8 frsumas\orders

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28 ORDERS ON WHATCOM COUNTY'S MOTIONS  
TO INTERVENE AND FOR TEMPORARY SUSPENSION,  
AND TAT'S MOTIONS TO SHORTEN TIME - 6

BRICKLIN & GENDLER  
ATTORNEYS-AT-LAW  
SUITE 1015 FOURTH AND PKE BUILDING  
SEATTLE WA 98101  
(206) 621 8868

## APPENDIX

The following were considered:

1. All materials and argument considered in connection with the "Findings of Fact, Conclusions of Law and Order Temporarily Suspending DNR Permit Approval, in Part, and Granting Intervention. "
2. Motion of Whatcom County to Intervene, to Shorten Time, and for Temporary Suspension Pending Appeal, filed on June 24, 1992.
3. Motion to Shorten Time, filed by TAT (USA) Corporation on June 29, 1992.  
  
Together with:      Motion to Dissolve Order Suspending DNR Permit.  
                            Memorandum of Authorities in Support of Motion to Dissolve  
                            Suspension Order.  
                            Declaration of William F. Lenuhan with attachments thereto.  
                            Opposition to the Motions of Whatcom County to Intervene and  
                            Suspend TAT's DNR Permit.
4. Supplemental Declaration of Dale T. Griggs, filed by Nooksack Indian Tribe on June 30, 1992.
5. Memorandum of Whatcom County and Friends of Sumas Mountain in Opposition to TAT's Motions and in Support of Whatcom County's Motions, filed on June 30, 1992.
6. TAT's Supplemental Opposition to County Intervention, filed on June 30, 1992.
7. The oral argument of counsel heard July 1, 1992, or the record thereof.
8. Pursuant to TAT (USA) Corporation's request to submit further materials granted by the Commissioner of the Supreme Court on July 2, 1992, the following were also considered:
  - A. TAT's Memorandum of Authorities in Opposition to Suspension of Permits with attachments, filed on July 7, 1992.
  - B. Statement of Forest Practices Board and Department of Ecology in Proposed Stay Orders, filed on June 30, 1992.
  - C.. On July 8, 1992, Response of Whatcom County and Friends of Sumas Mountain and the Nooksack Tribe to Respondent's Untimely Supplemental Materials. was filed.

The records and files herein.

1                   **BEFORE THE FOREST PRACTICES APPEALS BOARD**  
2                   **STATE OF WASHINGTON**

3       **FRIENDS OF SUMAS MOUNTAIN,**                   )

4                   **Appellants,**                   )

5                   **and**                   )

6       **WHATCOM COUNTY,**                   )

7                   **Appellant-Intervenor.**                   )

8                   **and**                   )

9       **NOOKSACK INDIAN TRIBE.**                   )

10                   **Appellant-Intervenor.**                   )

11                   **v.**                   )

12       **STATE OF WASHINGTON, DEPARTMENT**                   )  
13       **OF NATURAL RESOURCES; TAT (U.S.A.)**                   )  
14       **CORPORATION; TRILLIUM**                   )  
15       **CORPORATION; DEPARTMENT OF**                   )  
16       **ECOLOGY and FOREST PRACTICES**                   )  
17       **BOARD,**                   )

18                   **Respondents.**                   )  
19       \_\_\_\_\_)

20                   This matter came on for hearing before the Forest Practices Appeals Board.  
21                   William A. Harrison, Administrative Appeals Judge, presiding, and Board Members  
22                   Norman L. Winn and Dr. Martin R. Kaatz.

23                   The matter is the appeal of a forest practices application approval granted by the State  
24                   Department of Natural Resources to TAT (USA) Corporation.

25  
26       **FINAL FINDINGS OF FACT,**  
27       **CONCLUSIONS OF LAW AND ORDER**  
      **FPAB NO. 92-13**



1  
2 Appearances were as follows:

3 1. David S. Mann, Attorney at Law, representing Friends of Sumas Mountain and  
4 Whatcom County;

5 2. Jeffrey Jon Bode, Attorney at Law, representing the Nooksack Indian Tribe;

6 3. William F. Lemhan, Attorney at Law, representing TAT (USA) Corporation;

7 4. Jonathon Gurish, Assistant Attorney General, representing the Department of  
8 Natural Resources;

9 5. Daniel D. Zender, Attorney at Law, representing Trillium Corporation;

10 6. Patricia Hickey O'Brien, Assistant Attorney General, representing the Forest  
11 Practices Board;

12 7. Kathryn L. Gerla, Assistant Attorney General, representing the Department of  
13 Ecology.

14 The hearing was conducted at Bellingham and Seattle, from October 5 through  
15 October 15, 1992. In all, nine days were devoted to the hearing on the merits.

16 Gene Barker and Associates, Olympia, provided court reporting services.

17 Witnesses were sworn and testified. Exhibits were examined. The Board viewed the  
18 site of the proposal in the company of Judge Harrison and the parties. From testimony heard  
19 and exhibits examined, the Forest Practices Appeals Board makes these

## 20 FINDINGS OF FACT

### 21 I

22 This matter arises on Sumas Mountain in Whatcom County.

### 23 II

24 On February 13, 1992, respondent TAT (USA) Corporation filed a forest practices  
25 application with the State Department of Natural Resources (DNR). The proposal consisted of

26 FINAL FINDINGS OF FACT.

27 CONCLUSIONS OF LAW AND ORDER

FPAB NO. 92-13

(2)

1 clear cut logging on 71 of 80 acres belonging to Trillium Corporation. The site is on the west  
2 facing slope of Sumas Mountain.  
3

### 4 III

5 The DNR received letters of concern from both Whatcom County and the Nooksack  
6 Indian Tribe regarding unstable slopes and harvest near creeks. The residents of homes  
7 located downslope from the site also expressed misgivings over the proposal. The DNR  
8 classified TAT's application as "Class III - Priority." The effect of that classification is to  
9 convene an "Inter-Disciplinary Team" (ID team) to visit the site of the proposed logging and  
10 report to DNR.

### 11 IV

12 On April 2, 1992, an ID team of approximately 20 people visited the site of the  
13 proposed logging. In accordance with the Timber-Fish-Wildlife (TFW) agreement from which  
14 the ID team derived, membership on the team included not only different disciplines but  
15 different interest groups. Both the applicant and DNR were represented. So was Whatcom  
16 County and the State Department of Ecology. A downslope resident was on the ID team, also.  
17 The Nooksack Indian Tribe was invited to participate in the ID team but declined. A written  
18 report of the ID team discussion, though skeletal, seems to indicate concurrence between DNR  
19 and Ecology that the "RLA's" (riparian leave areas) were generally acceptable along the three  
20 creeks on the site, Falls Creek, Dry Creek and Power Creek. Falls Creek and Power Creek  
21 have incised steep gorges running across the site.

### 22 V

23 On April 3, 1992, the DNR convened a public meeting at the local grange hall to  
24 inform the public of the proposal.  
25

26 FINAL FINDINGS OF FACT.  
27 CONCLUSIONS OF LAW AND ORDER  
FPAB NO. 92-13

1  
2 VI

3 On April 11, 1992, Dr. Don J. Easterbrook, Professor of Geology, Western  
4 Washington University, and Dr. Scott Babcock, Associate Professor of Geology, published  
5 their report entitled "Preliminary Report on the Slope Stability of Sumas Mountain." The  
6 report concluded that, "The slope conditions of this parcel of land are among the worst that  
7 exist in Whatcom County." The conclusion rested on analysis of 1) serpentine bedrock, 2)  
8 unconsolidated glacial sediment and 3) potential for debris torrents.

9 VII

10 On April 20, 1992, the Whatcom County staff geologist, based on a visit to the site in  
11 March, 1992, filed his report to DNR. In it he approved generally of the soundness of the  
12 proposal, but urged expansion of the riparian zones along the creeks.

13 VIII

14 By reports of February 10, 1992, and March 5, 1992, TAT's geology consultant,  
15 W.D. Purnell & Associates, Inc., informed DNR that the proposed road construction would  
16 have minimal impact and that logging would not adversely affect stability of soils. The  
17 Purnell reports relied on unpublished Soil Conservation Service soil maps and site visits for  
18 these conclusions.

19 IX

20 On April 29, 1992, largely because of concern over the Easterbrook and Babcock  
21 report, DNR asked its staff geologist, Mr. Matthew J. Brunengo to visit the site.  
22 Mr. Brunengo did so, in the company of Dr. Easterbrook on April 29, 1992.

23 X

24 Mr. Brunengo never prepared a written report of his investigation. He reported orally,  
25 to DNR, that 1) the sandstone cap over the weaker serpentinite was depositional in origin

1 rather than a fault contact and therefore the surface of contact between the two rock units is  
2 not planar, 2) the sandstone cap would not likely yield to pore water pressure, and 3) there  
3 were no signs of previous landsliding on the surface. Both of these suggested to him that there  
4 was little potential for deep-seated landslides. Like the Whatcom County geologist, he  
5 recommended expansion of the leave areas along the streams.  
6

#### 7 XI

8 On May 1, 1992, DNR approved TAT's application with 23 written conditions. The  
9 no cut and partial cut areas along streams, as prescribed by these conditions, are set forth on  
10 the diagram marked as Exhibit R-19 on this record.

#### 11 XII

12 On May 8, 1992, Drs. Easterbrook and Babcock published their final "Report on the  
13 Slope Stability of Sumas Mountain." This report differed sharply from the reports of TAT's  
14 consultant and the County geologist. The Easterbrook report emphasized the increased  
15 precipitation to the soil after logging and the combination of that factor with 1) unstable  
16 serpentinite rock underlying the entire site, and 2) debris torrent potential localized in the  
17 creek gorges running down the site. The Easterbrook final report was the most extensive and  
18 detailed examination of those factors on the site to that time.

#### 19 XIII

20 On May 29, 1992, appellant Friends of Sumas Mountain, appealed DNR's approval of  
21 the TAT application here. Subsequently, the Nooksack Indian Tribe and Whatcom County  
22 moved to intervene as parties appellant. which intervention was granted. Following motions,  
23 we suspended, in part, DNR's approval of the TAT application during the pendency of this  
24 appeal. See Findings and Conclusions entered July 31, 1992. The matter was originally set  
25

1 for trial in September, 1992, and by stipulation was continued to commence on October 5,  
2 1992.

#### 3 XIV

4 Following the appeal and suspension, TAT commissioned the following consultants'  
5 reports: 1) Dr. Henry Froehlich and Curt Veldhuisen, M.S., Forest Hydrologists,  
6 September 30, 1992; 2) W. D. Purnell & Associates, Inc., October 1, 1992; and 3) Lee  
7 Benda, October 1, 1992.

#### 8 XV

9 The central issue here is the effect of clear cut logging on the stability of the slopes in  
10 question. All parties have examined slope stability with regard to two basic types of failures  
11 or landslides. These are: 1) shallow-rapid failure, and 2) deep-seated landslides.

#### 12 XVI

13 Shallow-rapid failure. Shallow-rapid failure is essentially soil slippage. It may draw  
14 standing or down timber along with it resulting in a debris flow. Where the soil and debris  
15 block a watercourse, the flowing water may collect behind the "dam" giving rise to  
16 catastrophic dam break floods. Shallow-rapid failures may involve some critical combination  
17 of heavy rains, rain on melting snow, vulnerable soils and steep slopes.

#### 18 XVII

19 The term "interception" means the process by which rain collects on tree canopy, then  
20 evaporates back into the air without reaching the soil. A similar concept, "evapotranspiration"  
21 involves rain reaching the soil but then being drawn up by trees and released into the air as a  
22 result of photosynthesis. The Easterbrook report points out the function that interception and  
23 evapotranspiration play in reducing the rainwater that goes to the soil. Likewise it relies on  
24 data gathered all around the country to conclude that somewhere between 50 and 90 percent of  
25

1 rainfall is intercepted by forest canopy This is the increase in precipitation which would be  
2 expected to reach the ground after logging, according to that report.  
3

#### 4 XVIII

5 The Froehlich report quantifies the small proportion of the total area of the regional  
6 watersheds that is occupied by the harvest unit. The report uses Pacific Northwest  
7 precipitation data to predict the magnitude of soil moisture input. In doing so, it properly  
8 rejects the annual average increase due to logging where the concern is for shallow-rapid  
9 failure. Because such failures are storm driven, it examined the increase in soil moisture input  
10 during heavy winter rainstorms. The report considered the canopy coverage of the site which  
11 is approximately 70 percent. It also considered the possible aggravating effect of additional  
12 water from melting snow. The site lies between 400 and 950 feet elevation, while the critical  
13 rain on snow zone lies above that at 1000-3000 feet. The increase in soil moisture input  
14 during heavy winter storms, even aggravated by a factor for melting snow, is 6 to 10 percent  
15 at the site in question. The effect of lack of interception in heavy winter rainstorms is  
16 therefore negligible, excepting perhaps on the steepest slopes.

#### 17 XIX

18 The steepness of slopes on which shallow-rapid failure would be of concern is  
19 described by the Benda report as those of 35 degrees or greater. This report is based on the  
20 TFW method which inventories past land failures and slides throughout the greater watershed  
21 containing a logging proposal. An examination of the greater watershed enclosing the site has  
22 shown that shallow-rapid failure is largely confined to the inner gorges of creeks where slopes  
23 of greater than 35 degrees are located.  
24  
25

1  
2 XX

3 The approved application imposes no-cut zones on the inner gorges, including the  
4 slopes of 35 degrees or greater. Selective logging is allowed in a limited, marked zone  
5 adjacent to the summit of the no-cut zone on Power Creek to remove trees probably subject to  
6 windthrow. These trees would increase the risk of shallow-rapid failure if blown over. The  
7 added soil moisture input from the proposal poses no significant potential for worsening the  
8 existing natural risk of shallow-rapid failure

9 XXI

10 Deep-seated landslides. Deep-seated landslides involve the failure of bedrock. The  
11 Easterbrook report cites the presence of serpentinite bedrock on the TAT site. It describes  
12 serpentinite as follows:

13 Serpentinite is a dark green, hydrous silicate mineral that forms from  
14 the breakdown of minerals typically found in rocks made of iron and  
15 magnesium silicates. An example of such a rock is the olivine-rich  
dunite of the Twin Sisters Range.

16 The most significant physical properties of serpentinite are that it is  
17 soft, weak, and typically highly fractures along slippery planes known as  
18 slickensides. Because of its physical properties, serpentinite causes  
unstable slopes and landslides and commonly results in landsliding,  
especially on steep to moderate slopes.

19 XXII

20 It is undisputed that serpentinite underlies the TAT site although it is exposed at the  
21 surface only in the creek gorges excluded from logging. Both Easterbrook and others  
22 acknowledge that sandstone (Chuckanut Huntingdon Formation) overlies the serpentinite.  
23  
24  
25

1 Easterbrook concludes:  
2

3 How much of the serpentinite that underlies the steep, west-facing  
4 slope might be covered by sandstone is difficult to assess because of the  
5 lack of good exposures. However, that question is moot because, as  
6 seen in the Swift Creek landslide, the sandstone is not thick enough to  
provide adequate protection from soil moisture to prevent slope failure in  
the underlying serpentinite.

### 7 XXIII

8 Easterbrook's conclusion, above, is premised upon his estimate that logging will  
9 increase soil moisture input somewhere between 50 and 90 percent. (See Finding of Fact XV,  
10 above.) Where deep-seated landslides are concerned, the increased annual average moisture  
11 entering the soil, due to logging, is the pertinent variable. The Froehlich report accurately  
12 reports this at levels for the site which are considerably below those approximated by  
13 Easterbrook. Following harvest, soil moisture input may be expected to increase on the site  
14 from 11 to 15 inches per year. Given the 35 inches of precipitation, annual average, now  
15 reaching the soil, this represents an increase of 30 to 40 percent. Noel Wolff, DNR  
16 hydrologist, indicated that the additional amount of water expected to reach the surface  
17 following canopy removal is within the normal range of year to year variability in annual  
precipitation (40-70 inches) at the site.

### 18 XXIV

19 Purnell has concluded that sandstone overlying the serpentinite would not become  
20 saturated as a result of increased soil moisture following logging. Nevertheless, taking a  
21 conservative approach, he did a computer model assuming that logging causes the sandstone to  
22 become saturated. Purnell's computer modeling reported October 1, 1992, has shown that  
23 even saturated sandstone provides protection adequate to prevent slope failure.  
24  
25



XXV

A large deep-seated landslide is within one mile of the site. Known as the Swift Creek slide, it is pre-historic and natural in its origins. Also within about a mile of the site is the Dale Creek slide. It originated in about 1989, also from natural causes. Easterbrook has concluded that the geological conditions at the Swift Creek slide, Dale Creek slide and the site are identical. Babcock did not agree that geological conditions at the Swift Creek and Dale Creek slides are identical to the TAT site, and urged that analysis should be based on conditions at the TAT site.

XXVI

Both the Swift Creek and Dale Creek slides were initiated on the steep inner gorge of creeks. These were slopes which, in Swift Creek, were likely to be in excess of 35 degrees and in Dale Creek were in excess of 35 degrees. The slope of the planar west face of the site to be logged is, by contrast, from 20 to 30 degrees.

XXVII

The Swift Creek slide plane is located in a zone of highly weathered serpentinite. Serpentinite debris also lies at the bottom of the Dale Creek slide. Samples of serpentinite taken from the TAT site do not show evidence of substantial weathering.

Serpentinite from the Twin Sisters Range was cited by Easterbrook as exemplary of that rock. (see Finding of Fact XIX, above.) Comparison of serpentinite samples from the site (Exhibits R-106A and B) with a sample from the Twin Sisters Range (Exhibit R-21) shows a contrast also. The latter has more of the slippery planes (slickenslides) than samples from the site.

1  
2 XXVIII

3 Because of differences in slope gradient, proximity to streams and the condition of the  
4 underlying serpentinite, the TAT site is more stable than, and not identical to, the Swift Creek  
5 and Dale Creek slides.

6 XXIX

7 The surface of the TAT site does not show rolling topography, sag ponds, scarps,  
8 tipped trees or other indications, of instability as found at the Swift Creek slide.

9 XXX

10 Logging as approved on this site raises no significant potential for triggering a deep-  
11 seated landslide.

12 XXXI

13 In summary, timber harvest as approved on the TAT site poses no significant potential  
14 for worsening the existing natural risk of shallow-rapid failure, nor for triggering a deep-  
15 seated landslide. The same can be said for the road, where construction is strictly conditioned  
16 by the permit. Among the conditions is daily monitoring to ensure that if serpentinite bedrock  
17 is uncovered during road construction the construction must cease. The road must also be  
18 abandoned according to a plan approved by the DNR.

19 XXXII

20 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.  
21 From these Findings of Fact, the Board issues these:

22 CONCLUSIONS OF LAW

23 I

24 The pertinent forest practices regulation in this case is the rule of the Forest Practices  
25 Board, classifying forest practices, WAC 222-16-050. Appellants urge that this application

1 should have been classified as Class IV-Special under that regulation. It would then receive  
2 consideration under the State Environmental Policy Act, chapter 43.21C RCW. Forest  
3 practices which are not Class IV are exempt from SEPA requirements leading to a threshold  
4 decision or environmental impact statement. RCW 43.21C.037. This application was  
5 classified as Class III and thus exempt from SEPA.  
6

## 7 II

8 The text of the classification rule, WAC 222-16-050 is as follows:

9 WAC 222-16-050 CLASSES OF FOREST PRACTICES. There are 4  
10 classes of forest practices created by the act. ~~((These classes are listed below  
in the order most convenient for the applicant's use in determining into which  
class his operations fall.))~~ All forest practices (including those in Classes I and  
11 II) must be conducted in accordance with the forest practices regulations.

12 (1) "CLASS IV - SPECIAL" Application to conduct forest practices  
13 involving the following circumstances requires an environmental checklist in  
14 compliance with the State Environmental Policy Act (SEPA), and SEPA  
guidelines, as they have been determined to have potential for a substantial  
15 impact on the environment. It may be determined that additional information  
or a detailed environmental statement is required before these forest practices  
may be conducted.

16 ~~"(a) ((Aerial application of pesticides to an "area of water supply interest"  
as determined according to WAC 222-39-020(5)(i).)) Aerial application of  
pesticides in a manner identified as having the potential for a substantial  
17 impact on the environment under WAC 222-16-070~~

18 (b) Harvesting, road construction, site preparation or aerial application of  
pesticides:

19 (i) On lands known to contain a breeding pair or the nest or breeding  
grounds of any threatened or endangered species or

20 (ii) Within the critical habitat designated for such species by the United  
States Fish and Wildlife Service

21 ~~(c) ((Widespread use of DDT or a similar persistent insecticide--~~

22 ~~(d))) Harvesting, road construction, aerial application of pesticides and site  
preparation on all lands within the boundaries of any national park, state park,  
or any park of a local governmental entity, except harvest of less than 5 MBF  
within any developed park recreation area and park managed salvage of  
merchantable forest products~~

23 ~~"(((e))) (d) Construction of roads, landings, rock quarries, gravel pits,  
borrow pits, and spoil disposal areas on slide prone areas as defined in WAC  
222-24-020(6) and field verified by the department, when such slide prone  
24 areas occur on an uninterrupted slope above ((a-Type 1, 2, 3 or 4)) any Water~~

25  
26 FINAL FINDINGS OF FACT.

27 CONCLUSIONS OF LAW AND ORDER

FPAB NO. 92-13

(12)

1 Type or capital improvement of the state or its political subdivisions where  
2 there is potential for a substantial debris flow or mass failure to cause  
3 significant impact to public resources.

4 \*(e) Timber harvest on slide prone areas, field verified by the department,  
5 where soils, geologic structure and local hydrology indicate that canopy  
6 removal has the potential for increasing slope instability, when such areas  
7 occur on an uninterrupted slope above any Water Type or a capital  
8 improvement of the state or its political subdivisions where there is a potential  
9 for a substantial debris flow or mass failure to cause significant impact to  
10 public resources.

11 (f) Timber harvest, construction of roads, landings, rock quarries, gravel  
12 pits, borrow pits, and spoil disposal areas on snow avalanche slopes within  
13 those areas designated by the department, in consultation with department of  
14 transportation, as high avalanche hazard.

15 (g) Timber harvest, construction of roads, landings, rock quarries, gravel  
16 pits, borrow pits, and spoil disposal areas on archaeological or historic sites  
17 registered with the Washington state office of archaeology and historic  
18 preservation, or on sites containing evidence of Native American cairns,  
19 graves or glyptic records, as provided for in chapters 27.44 and 27.53 RCW.  
20 The department shall consult with affected Indian Tribes in identifying such  
21 sites.

22 (This was adopted as an Emergency Rule. Underlining and strike-outs are from the text and  
23 show amendments).

### 24 III

25 The subsections of the above rule applicable here are WAC 222-16-050(e) relating to  
26 "Timber harvest on slide prone areas . "and WAC 222-16-050(d) relating to "Construction of  
27 roads" on such areas.

### IV

28 The proposed forest practices as strictly conditioned, do not have any significant  
29 potential for increasing slope instability beyond existing natural conditions. There is  
30 accordingly no significant potential to cause a substantial debris flow or mass failure.<sup>1</sup> The  
31 DNR correctly classified this application as a Class III forest practice under WAC 222-16-050

32 <sup>1</sup> Because the proposal does not involve potential for land failure, we do not reach the distinction of the rule  
33 which grants SEPA review when slides endanger "public resources" but appears to withhold SEPA review when  
34 only human life or property is endangered. We are doubtful of this distinction and our decision today does not  
35 rest upon it.

V

While not currently in regulatory form, we commend the TFW approach for watershed analysis in assessing slope stability. It led to consideration, here, of the logging and landslide history in the greater area surrounding the site. See, Benda, report of October 1, 1992, exhibit R-102A, B, and C. This represents an advancement from the past practice of assessing only the area within the four corners of the site to be harvested, and resulted in the careful application of restrictions on road construction and harvest techniques as well as the imposition of riparian buffer zones extending to the top of the stream valley ridge lines.

VI

Appellants also urge that WAC 222-16-050 is underinclusive, exceeds the statutory authority of the Forest Practices Act and is invalid. In Snohomish County, et. al v. Dept. of Natural Resources, et. al., FPAB Nos. 89-12 and 89-13 (the Lake Roesiger case) we so ruled with regard to WAC 222-16-050. That rule then did not contain the amendments shown by underlining and strike-out in Conclusion of Law II, above. Since then, the rule has been amended to include WAC 222-16-050(e) addressing timber harvest on slide prone areas. That is the primary subject of this dispute. We conclude that the present WAC 222-16-050, as applied in this case, is valid.

VII

For the reasons set forth in Snohomish County, above, we reaffirm our primary jurisdiction to review the validity of rules as applied to the granting or denying of specific forest practice approvals. See, D/O Center v Department of Ecology, 119 Wn.2d 761 (1992).

VIII

Respondents Forest Practices Board and Department of Ecology's Motion to Dismiss is denied.

IX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.  
From the foregoing, the Board issues this:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**ORDER**

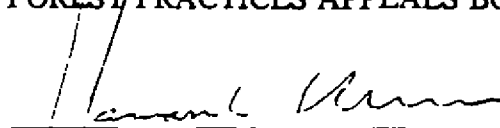
The forest practices approval granted by the Department of Natural Resources to TAT  
(USA) Corporation is hereby affirmed.

DONE at Lacey, Washington, this 4<sup>th</sup> day of November, 1992.

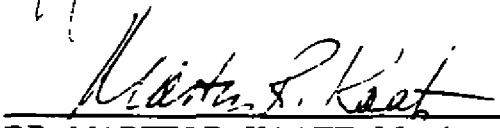


HONORABLE WILLIAM A. HARRISON  
Administrative Appeals Judge

STATE OF WASHINGTON  
FOREST PRACTICES APPEALS BOARD



NORMAN L. WINN, Member



DR. MARTIN R. KAATZ, Member

F92-13F

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
FPAB NO. 92-13

(15)